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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW SCOTT RAY,

Defendant and Appellant.

C067132

(Super. Ct. No. 10F0112C)

Defendant Matthew Scott Ray entered a negotiated plea of no contest to first degree burglary in exchange for no state prison at the outset and dismissal of the remaining counts. The trial court granted defendant probation subject to certain terms and conditions including payment of victim restitution in the amount of \$22,612.31.

Defendant appeals. He challenges the victim restitution order, renewing his claim that insufficient evidence supports a finding that the victim's losses were a result of his crime. We conclude that the trial court abused its discretion in imposing victim restitution because there is no evidence that

the burglary committed by defendant resulted in the victim's losses.

FACTS

On July 7, 2010, a detective "received information" that a burglary had occurred at a particular location, that the burglars had taken several items, and that the burglars intended to return to remove a safe. Several deputies went to the location and found that a house, trailer, garage, and several storage structures had all been opened. As demonstrated by dust patterns, some items had been removed. Other items were laid out in the house as if someone intended to return for them and a safe was on a dolly. The deputies secured all the buildings. From 11:00 p.m. on July 7 until 5:30 a.m. on July 8, the deputies watched the place but saw no suspects.

At 2:00 p.m. on July 8, detectives went to the location to take photographs and obtain fingerprints. Presumably, the detectives left at some unspecified time because when the deputies returned at 8:30 that night to watch the place, they discovered that someone had again broken into the house and had left the back door unsecured.

About 10:15 p.m. on July 8, the deputies saw a white truck drive past the property onto a dirt road, and heard the engine stop and doors close. Fifteen minutes later, they saw a flashlight scanning the property near the house. The flashlight turned off, and 15 minutes later, the deputies heard vehicle doors close and a vehicle coming back down the

dirt road. The deputies saw three people walking from the dirt road through the woods, using flashlights. The threesome, later identified as defendant, Jean Paul Barone, and Catrina Shantell Barone, approached the rear door of the house, and Catrina Barone entered. She came back out without carrying anything. The deputies arrested the threesome. Each had a flashlight, defendant had a set of gloves in his pants pocket, and Jean Barone had a set of gloves and a mask in his back pocket.

The information charged defendant and the Barones with first degree burglary, receiving stolen property, grand theft of a firearm, and conspiracy to commit first degree burglary, all on July 8. The information also charged the three with first degree burglary on July 6. Special allegations against Jean Barone included four on-bail enhancements, two prior prison terms, and a prior strike (2001 burglary). Special allegations against Catrina Barone included two on-bail enhancements and two prior prison terms.

Defendant pled no contest to the July 8 burglary in exchange for no state prison at the outset and the dismissal of the remaining counts. He did not execute a waiver allowing the court to consider facts on which the dismissed counts were based for purposes of sentencing and restitution. (*People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*).)

Defendant told a detective that he did not have anything to do with any earlier burglary. He claimed the Barones told him about a safe containing money in a house that was probably

abandoned and that if he helped remove it, he would get a share of the money. He agreed to help but upon arrival at the location he knew the house was not abandoned. He voiced his concerns but the Barones told him not to worry about it. He claimed he had never been at the location before and that he never went into the house.

When the probation officer interviewed defendant, he claimed that the Barones asked him for help in removing a safe from their relative's house but upon arrival, he knew what was about to happen, did not "feel right about it," told the Barones he wanted to leave, "but they kept reassuring him." Defendant told the probation officer that he knew it was his fault and that it was wrong. He felt "horrible for the victims and want[ed] to do anything possible to help them, including paying restitution." The probation officer opined that the 20-year-old defendant who did not have a prior record of any type was apparently "coerced into participating in the instant offense by two older and criminally sophisticated co-defendants."

The probation officer calculated the victim's losses based on the victim's itemization of all the items he claimed had been stolen from the property. The probation report also lists the victim's claim of lost income resulting from the loss of some of his tools.

At the restitution hearing, the probation officer testified that the victim used the property as a vacation home and as storage for equipment used in his construction

business. Much of the stolen equipment had belonged to the victim's father who had recently died. The victim could not determine when the listed items had been taken. Neither defendant nor the Barones had any of the victim's belongings in their possession at the time of their arrest. The record does not reflect that the victim's belongings were ever found.

Defendant also testified at the restitution hearing. He claimed he had been involved only in the July 8 burglary, that he had not entered the house, and that he had not taken any of the victim's property.

Defense counsel argued that defendant should not be responsible for any victim restitution since defendant was not liable for the previous burglaries at the property and had never entered the house. The trial court concluded defendant's plea of no contest could include anything taken in the days preceding July 8 (based on the "on or about" charging language) and awarded restitution in the amount that the victim claimed for the items taken as a joint and several obligation of defendant and the Barones (\$22,612.31). The trial court denied the victim's claim of lost income (\$20,000) as speculative. The trial court suspended imposition of sentence and granted defendant probation in accordance with the negotiated plea. Defendant accepted the terms and conditions.

DISCUSSION

Defendant contends the prosecution failed to prove the victim's losses were the result of the burglary that he

admitted committing. Because restitution was ordered as a condition of probation, the People respond there is no requirement that restitution be limited to losses caused by defendant's crime for which he was convicted.

A trial court has virtually unlimited discretion to take information of any kind into account when awarding restitution, which includes facts contained in a probation report. We review an award of restitution for an abuse of discretion, but there must be substantial evidence to support a finding that a claimed loss was a result of a defendant's criminal conduct. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045-1046; *People v. Baker* (2005) 126 Cal.App.4th 463, 469; *People v. Baumann* (1985) 176 Cal.App.3d 67, 81.)

Here, there is no evidence to support a finding that the losses for which the court ordered restitution resulted from the July 8 burglary admitted by defendant. The trial court's reasoning that the earlier burglaries were "on or about" the July 8 burglary to which defendant entered a plea cannot support the restitution order. "On or about" charging language allows proof to show "commission at any time within the statute of limitations" (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 192, p. 399) but does not mean a plea to an offense on a specific date established by a factual basis includes an admission of any other earlier burglary. Although the victim suffered a loss, there was no evidence defendant was responsible for the same. Defendant's crime was burglary on July 8 but there is no

evidence of any loss on that date. The restitution order for \$22,612.13 covers the victim's loss of numerous items and damage to his property. The record does not demonstrate that any of the victim's property was found in the possession of defendant or the Barones at the time of their arrests or at any other time. Defendant told a detective that the Barones told him about a safe containing money in a house that was probably abandoned and that if he helped remove it, he would get a share of the money. Defendant admitted to the probation officer that he knew the house contained a safe, explaining the Barones asked him for help in removing a safe from their relative's house. There is no evidence that either defendant or the Barones had ever been at the property prior to being caught there on July 8. On this record, we conclude the restitution order has no relationship to the crime of which defendant was convicted, that is, the July 8 burglary.

The People attempt to support the restitution order by stating generally that the restitution order relates to the crime for which defendant was convicted, burglary. The People do not cite to any facts to support the application of this general statement to defendant. Instead, the People attempt to rely on the holdings in *People v. Carbajal* (1995) 10 Cal.4th 1114 (*Carbajal*) and *People v. Baumann, supra*, 176 Cal.App.3d 67 to support their position that restitution need not be limited to the facts of a defendant's conviction. In both cases, there are facts showing a relationship between the defendant's criminal conduct and the restitution order. In

Carbajal, the court held that the trial court did not abuse its discretion in ordering the defendant to pay restitution to the owner of a car damaged in an accident from which the defendant had fled. The defendant had entered a plea of no contest to leaving the scene of an accident. (*Id.* at pp. 1118-1119.) *Carbajal* concluded, "[R]estitution is also related to the goal of deterring future criminality [in that it] act[ed] both as a deterrent to future attempts to evade his legal and financial duties as a motorist and as a rehabilitative measure tailored to correct the behavior leading to his conviction." (*Id.* at p. 1124.) There was no question as to the defendant's responsibility for the loss. The defendant admitted he had "'committed a negligent act of driving that caused damage to [the victim's] parked car.'" (*Ibid.*)

In *People v. Baumann*, *supra*, 176 Cal.App.3d 67, the defendant entered a plea to one count of embezzlement and five remaining counts of embezzlement were dismissed with a *Harvey* waiver. (*Id.* at pp. 72-73.) At the restitution hearing, the victim, the defendant's employer, presented evidence of 75 checks the defendant, as its bookkeeper, had altered or made payable to her husband's company or were otherwise unauthorized. (*Id.* at pp. 73-74.) The trial court determined the evidence supported restitution in an amount over \$20,000. (*Id.* at p. 74.) The *Baumann* court found that "the count to which defendant pleaded guilty was but one of a series of embezzlements from her employer committed over a period of

time.” (*Id.* at p. 78.) The evidence thus supported the restitution order since there was overwhelming evidence of the defendant’s responsibility. (*Id.* at pp. 77-79.)

In contrast, there is no evidence that defendant was responsible for the victim’s losses. *People v. Scroggins* (1987) 191 Cal.App.3d 502, upon which defendant relies, is applicable here. The defendant was charged with and pled guilty to receiving stolen property. As a condition of probation, he was ordered to pay restitution to four burglary victims. The defendant was not charged with or found guilty of the burglaries. (*Id.* at pp. 504-506.) The losses of the burglary victims “were not connected to [the defendant’s] crime.” (*Id.* at p. 506.) Because the restitution order had no relationship to the crime to which the defendant had entered a plea or to any rehabilitative effect, *Scroggins* struck the condition of probation requiring restitution and remanded to determine the amount, if any, that was directly related to defendant’s crime. (*Id.* at pp. 508.)

Here, defendant was ordered to pay victim restitution for property taken and damage done at an unknown time but before defendant’s burglary at 10:00 p.m. on July 8 when he and the Barones were caught at the site. Prior burglaries apparently occurred at the site: sometime on or before July 7 when the detective first “received information” that a burglary had occurred and that the burglars planned to return and remove a safe; sometime after 2:00 p.m. on July 8 when the detectives

left; and sometime around 8:00 p.m. on July 8 when the deputies arrived and found the back door unsecured again.

In exchange for defendant's plea to first degree burglary on July 8, a charge of first degree burglary on July 6 was dismissed.¹ There was no charge of a burglary on July 7, the date that the officer "received information" that a burglary had already occurred, presumably earlier that day or a prior date, and there was only one charge of a burglary on July 8, even though deputies found the back door unsecured again after the detectives left and the deputies arrived and began watching the place for the night.

Based on the lack of any evidence that the July 8 burglary committed by defendant resulted in the victim's losses, we must strike the victim restitution order.²

¹ We note that defendant did not enter a *Harvey* waiver to the charge of burglary on July 6. Generally, a *Harvey* waiver is required before victim restitution may be ordered on dismissed counts. (Pen. Code, § 1192.3, subd. (b).) However, a negotiated plea to a felony specified in Penal Code sections 1192.5 or 1192.7 is expressly excepted (Pen. Code, § 1192.3, subds. (a), (b)). Defendant entered a plea to first degree burglary, a felony specified in section 1192.7, subdivision (c)(18). Thus, defendant's plea bargain is not governed by section 1192.3.

² We also find merit in defendant's contention that the probation order does not reflect the amount orally ordered by the court. However, correction of the probation order to reflect the oral pronouncement is not required because we are striking the victim restitution order.

DISPOSITION

Defendant's first degree burglary conviction is affirmed. The case is remanded to the trial court, which is directed to prepare an amended probation order that deletes the condition requiring defendant to pay \$22,612.31 in victim restitution. The trial court shall forward a certified copy of the amended probation order to the probation department.

HOCH, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.